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No. 07-948

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In The
Supreme Court of the United States

NATIONAL CASUALTY COMPANY,

Petitioner,

v.

LOCKHEED MARTIN CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE

Respondent Lockheed Martin Corporation has no parent corporation. The only publicly traded company that holds 10% or more of its stock is State Street Corporation.

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INTRODUCTION

This insurance-coverage dispute does not raise "a pure legal question of admiralty jurisdiction . . . as to which the circuits are in conflict." Pet. 5. It concerns declaratory-judgment procedure as to which there is *no* conflict among the circuits.

Since the Declaratory Judgment Act was passed in 1934, every circuit court to address the issue has ruled that a declaratory-judgment action cannot preempt the Seventh Amendment rights that the defendant would have enjoyed had Congress not created the declaratory-judgment action. In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), all eight Justices participating in the case agreed that a declaratory-judgment action cannot be used to deprive a defendant of its Seventh Amendment right to try legal claims to a jury. In a declaratory-judgment action, whether a claim will be tried to a jury or the judge depends on how the case would have proceeded had there been no declaratory-judgment remedy.

The main pillar of the petition – the rule that the Seventh Amendment does not apply to admiralty cases, *see Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847) – is irrelevant in this case. The issue here is not the right of an admiralty plaintiff to designate its claim as "maritime" under Fed. R. Civ. P. 9(h), but rather the paramount rule that a declaratory-judgment action cannot override a constitutional jury-trial right. *Waring* was not a declaratory-judgment

case; when this Court decided *Waring*, declaratory relief was wholly unknown.

The circuit conflict on which petitioner relies concerns an issue that the Fourth Circuit explicitly announced it would not consider, *i.e.*, whether a claimant suing in admiralty under Rule 9(h) can deprive a counter- or cross-claimant of its jury trial right. Pet. App. 12a-15a. The Fourth Circuit explained, "We need not consider [that] issue[ ] because . . . *Beacon Theatres* requires a jury trial in this case, even if no counterclaims had been filed." *Id.* 15a.

On the issue that the Fourth Circuit actually decided, there is no conflict. No court of appeals has held that a plaintiff asserting a defensive "claim" for a declaration of non-liability can pre-empt the Seventh Amendment jury-trial right of the defendant, the true claimant, simply by bringing an action under the Declaratory Judgment Act and designating it as a maritime claim under Rule 9(h). This Court should therefore deny the petition.

STATEMENT OF THE CASE

The petition systematically disregards the fact that this is a declaratory-judgment action. Indeed, the question presented does not mention the declaratory-judgment nature of the action even though that was the basis on which the Fourth Circuit decided the case. Pet. App. 15a-18a.

Respondent's Insurance Claim. The Fourth Circuit outlined the most relevant facts leading to petitioner's pre-emptive claim for declaratory relief. Pet. App. 2a-4a. This case is a classic example of an insurer racing to the courthouse to preempt an insurance claim under a policy that it issued.

The true claimant in this "inverted" action is respondent, the policyholder. At issue is the amount of money that petitioner, the insurer, owes respondent for the hull-and-machinery losses sustained by respondent's vessel when it encountered high seas on an aborted voyage from Hawaii to Alaska. But for the Declaratory Judgment Act, respondent, the policyholder, would have filed suit under the policy to recover the vessel's hull-and-machinery losses. Indeed, petitioner did not file this declaratory-judgment action until after "[respondent] informed [petitioner] that it intended to file suit." Pet. App. 2a. Because petitioner raced to the courthouse first, respondent was forced to file a compulsory counterclaim to recover its insured loss.

Respondent's Jury-Trial Right. The Constitution, Art. III, § 2, provides that "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." In 1789, the First Congress enacted that "[t]he district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Judiciary Act of 1789, § 9, 1 Stat. 77. That provision,

as currently codified at 28 U.S.C. § 1333(1), gives district courts original jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" The saving-to-suitors clause "was designed to protect remedies available at common law." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454 (2001). "Trial by jury is an obvious . . . example of the remedies available to suitors." *Id.* at 454-455. The jury-trial right is guaranteed by the Seventh Amendment.

Under the saving-to-suitors clause, maritime claimants are not compelled to proceed in admiralty but may pursue their common-law remedies under diversity jurisdiction. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 370 (1959); Pet. App 6a-7a. A claim for losses covered by a marine insurance policy is a *legal* claim subject to the saving-to-suitors clause of 28 U.S.C. § 1333(1) that can be tried before a jury in a state court or in a district court if there is diversity of citizenship between the parties.

In the ordinary course of events, as the Fourth Circuit notes, respondent would have sued petitioner under diversity jurisdiction and demanded the jury trial guaranteed by the Seventh Amendment. Pet. App. 16a-18a. Petitioner seeks to preempt that jury-trial right by filing the declaratory-judgment action and by designating its declaratory-judgment "claim" – *i.e.*, a determination of the amount owed under the policy – as a maritime claim under Rule 9(h). But as the Fourth Circuit has ruled, an insurer such as

petitioner cannot use a declaratory-judgment action as a sword to cut off the constitutional jury-trial right that the saving-to-suitors clause guarantees an insured such as respondent.

Marine insurers are not a special class of insurers at liberty to do what non-marine insurers cannot do. It is purposeless for amicus American Institute of Marine Underwriters to suggest that a judge rather than a jury must decide factual issues in claims under marine insurance policies lest the outcome of such claims somehow grow uncertain.[1] Holders of marine insurance policies cannot lose their constitutional right to have a jury decide the facts simply because marine insurers may collectively consider jury trials more burdensome than bench trials.

To be sure, as *Waring* recognized, the Seventh Amendment does not create a constitutional right to a jury trial in admiralty cases. Pet. 8. And in a conventional maritime case, as the Fourth Circuit recognized, a plaintiff suing in admiralty and designating its claim under Rule 9(h) would obtain a bench trial. In such cases, the saving-to-suitors clause would not grant the right to jury trial to a defendant that does not file a legal counterclaim. Pet. App. 12a.

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[1] The suggestion is also somewhat ironic in view of this Court's decision that marine insurance questions are routinely governed by state law. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-317 (1955).

Petitioner asserts that the Fourth Circuit's ruling that respondent would be entitled to a jury trial even if it had not filed its compulsory counterclaim is at odds with that customary maritime rule. Pet. 8-9. Petitioner overlooks, however, the two-fold grounds for respondent's jury-trial demand and the fact the Fourth Circuit granted mandamus and ordered a jury trial based only on the second of those grounds, *i.e.*, the *Beacon Theatres* rule.

The Decision Below. As the Fourth Circuit states, respondent asserted a jury-trial right on two independent grounds. Pet. App. 8a. It first asserted that right based on the compulsory counterclaim filed in response to the declaratory-judgment complaint. Because "the parties are diverse and the amount-in-controversy requirement is satisfied," respondent asserted "the right under the savings-to-suitors clause to demand a jury trial on the counterclaim." *Id.*

In addition, respondent asserted an *alternative* jury-trial right based on *Beacon Theatres*, "in which the Supreme Court held that the right to a jury trial in a declaratory judgment action depends on whether there would have been a right to jury trial had the action proceeded without the declaratory-judgment vehicle." *Id.* 8a-9a. On that alternative ground, respondent's counterclaim was irrelevant because petitioner's declaratory-judgment action could not preempt respondent's jury-trial right whether or not respondent filed a counterclaim. The Fourth Circuit, applying *Beacon Theatres*, granted mandamus and

ordered a jury trial on that alternative ground. Pet. App. 15a-18a. No circuit decision or decision of this Court suggests it was wrong to do so.

- The Fourth Circuit did not decide the issue based on respondent's counterclaim.

In addressing respondent's counterclaim argument, the Fourth Circuit noted that "[g]enerally speaking, the right to determine whether a claim will proceed as an admiralty claim (without a jury) or as a common law claim (with a jury) belongs strictly to the plaintiff." Pet. App. 12a. "In cases involving counterclaims or cross-claims that could proceed at law," however, the court of appeals recognized, "courts are divided on the question of whether the plaintiff's Rule 9(h) admiralty designation prevents the defendant from obtaining a jury trial." *Id.* The Fourth Circuit then canvassed the authority reflecting the split between the circuits on *that* question, *i.e.*, whether counter- or cross-claimants can demand jury trial in an action commenced by the plaintiff under Rule 9(h) Pet. App. 12a-14a. *That* is the circuit conflict on which petitioner bases its petition for certiorari. The Fourth Circuit's decision, however, does not address that issue or implicate that conflict.

- The Fourth Circuit decided the issue based on the declaratory-judgment nature of the action.

The Fourth Circuit based its decision instead on the second prong of respondent's jury demand, *i.e.*, that *Beacon Theatres* requires a jury trial regardless of

respondent's counterclaim because of the declaratory-judgment nature of the action. As the Fourth Circuit ruled:

> We need not decide, however, whether the counterclaims asserted by Lockheed are "true" counterclaims, nor need we decide how a defendant's jury demand would be resolved if his counterclaims were not true counterclaims. We need not consider these issues because we agree with Lockheed that *Beacon Theatres* requires a jury trial in this case, even if no counterclaims had been filed.

Pet. App. 15a. After addressing the facts and reasoning of *Beacon Theatres*, the Fourth Circuit explained why *Beacon Theatres* was controlling:

> This case, like *Beacon Theatres*, involves a declaratory judgment action commenced by the party that, but for the existence of the declaratory judgment procedure, would have been the defendant. Although the action sounds in admiralty, that is only because National won the race to the courthouse door and made the Rule 9(h) designation first. *Beacon Theatres*, however, requires us to ignore National's status as the declaratory judgment plaintiff and to instead look to how the action otherwise would have proceeded. Without the declaratory judgment vehicle, Lockheed would have sued National for breach of the insurance policy, a claim over which admiralty and "law" courts have concurrent jurisdiction. As the plaintiff, Lockheed would have been entitled under the

> saving-to-suitors clause to designate its claim as a legal one as to which there is a Seventh Amendment right to jury trial.

Pet. App. 16a-17a. As the Fourth Circuit proceeded to explain, *Beacon Theatres* could not be distinguished on the grounds that petitioner had designated its claim for a declaratory judgment as a maritime claim. *Id.* 17a-18a. What is dispositive, the Fourth Circuit concluded, is the declaratory-judgment nature of the action, not petitioner's designation of its declaratory-judgment claim as a maritime claim under Rule 9(h):

> At issue in this case is a dispute over whether an insurer is obligated to indemnify its insured for damage sustained by an insured vessel. In the usual course of events – that is, without the declaratory judgment vehicle – Lockheed would have sued National for breach of the insurance contract. And under the saving-to-suitors clause, Lockheed would have been entitled to a jury trial on that claim. Accordingly, under *Beacon Theatres*, Lockheed cannot lose its right to a jury trial simply because National initiated the declaratory judgment action.

Id. 18a. That ruling – entirely consistent with *Beacon Theatres* and not suggestive of any conflict among the circuits – does not warrant review by this Court.

REASONS FOR DENYING THE PETITION

I. The Petition Ignores Long-Settled Authority Precluding Plaintiffs From Using The Declaratory-Judgment Procedure To Prevent Jury Trials.

The Declaratory Judgment Act. The Declaratory Judgment Act, Act of June 14, 1934, ch. 512, 48 Stat. 955, was originally codified at 28 U.S.C. § 274D (1934), and is now codified at 28 U.S.C. §§ 2201-02 (2006). It specifically preserved the right of jury trial for both parties. *See* original § 274D(3) ("When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.") That jury-trial right is now preserved in Fed. R. Civ. P. 57, 38, and 39.

The Uniform Declaratory-Judgment Jurisprudence. After the Declaratory Judgment Act was passed, numerous courts of appeals recognized without exception that in a declaratory-judgment action issues arising at law must be tried to a jury.[2] For

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[2] *See Aetna Cas. & Surety Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) ("Where the issues raised in a proceeding for a declaratory judgment are of this [legal] nature, they must be tried at law if either party insists upon it, for the statute so provides. 28 U.S.C.A. § 400(3). And, irrespective of this provision of the statute, it is clear that the right of jury trial in what is

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example, in *Pacific Indemnity Co. v. McDonald*, 107 F.2d 446 (9th Cir. 1939), the court applied that rule specifically to an insurance company that filed a declaratory-judgment action against its insured in anticipation of a claim under the policy. "In such a proceeding," the court ruled, "although the parties are reversed in their position before the court, that is, the defendant has become the plaintiff, and vice versa, the issues are ones which in the absence of the statute for declaratory relief would be tried at law by a court and jury. In such a case we hold that there is an absolute right to a jury trial unless a jury has been waived." *Id.* at 448. That absolute jury-trial right remains the controlling rule.[3]

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essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure."); *United States Fidelity & Guaranty Co. v. Koch*, 102 F.2d 288, 291 (3rd Cir. 1939) (quoting *Aetna*); (*American*) *Lumbermens Mut. Cas. Co. v. Timms & Howard*, 108 F.2d 497, 499 (2d Cir. 1939) ("But it is quite clear that the declaratory judgment is not a means of evading trial by jury, and that jury trial may be had as of right in a declaratory action such as this which at bottom concerns the duty of the contract-obligor to pay money on the fulfillment of a condition.").

[3] *See also Piedmont Fire Ins. Co. v. Aaron*, 138 F.2d 732, 734 (4th Cir. 1943) (action on binder of insurance triable at law to a jury); *Hargrove v. Amer. Cent. Ins. Co.*, 125 F.2d 225, 228 (10th Cir. 1942) ("The procedural remedy afforded by the Declaratory Judgment Act is neither legal nor equitable, however its utilization does not alter or invade the right of trial by jury as at common law."); *Dickinson v. Gen. Accident Fire & Life Assur. Corp.*, 147 F.2d 396, 397 (9th Cir. 1945) ("In the absence of the procedure for declaratory relief it is plain that the issues here litigated could have been developed only in an action at law on

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Beacon Theatres. In *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), this Court confirmed a defendant's right to try legal claims in a declaratory-judgment action to a jury. The plaintiff (Fox) asked for declaratory relief alleging anti-trust claims against defendant Beacon under the Sherman Act and the Clayton Act, and seeking injunctive relief. 359 U.S. at 502. Beacon counterclaimed and demanded a jury trial. *Id.* at 503. The threshold issue was whether Fox's complaint for declaratory relief stated legal claims triable to a jury. Both the majority and the dissent recognized the constitutional right to try legal claims in a declaratory-judgment action to a jury. As Justice Black stated for the Court:

> The District Court's finding that the Complaint for Declaratory Relief presented basically equitable issues draws no support from the Declaratory Judgment Act, 28 U.S.C.

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the policy. A party may not, merely by reversing the normal procedure, deprive his adversary of the right which would otherwise be his to have his case determined by a jury.") (citing *Pacific Indemnity*); *Johnson v. Fid. & Cas. Co. of N.Y.*, 238 F.2d 322, 324 (8th Cir. 1956) (same) (citing *inter alia* (*American*) *Lumbermens* and *Pacific Indemnity*); *Oklahoma Contracting Co. v. Magnolia Pipe Line Co.*, 195 F.2d 391, 396 (5th Cir. 1952) ("The constitutional right of a litigant to have a jury pass upon the facts in actions at common law is, of course, in no way modified or affected because demanded by a counter-claiming defendant in a declaratory judgment proceeding. Any party asserting rights in an action at common law, whether by complaint or counter-claim, in a declaratory judgment action or other proceeding, is entitled, upon demand, to have a jury pass upon any issue triable of right by a jury.").

> §§ 2201, 2202; Fed. Rules Civ. Proc., 57. See also 48 Stat. 955, 28 U.S.C. (1940 ed.) § 400. *That statute, while allowing prospective defendants to sue to establish their nonliability, specifically preserves the right to jury trial for both parties. It follows that if Beacon would have been entitled to a jury trial in a treble damage suit against Fox it cannot be deprived of that right merely because Fox took advantage of the availability of declaratory relief to sue Beacon first.*

359 U.S. at 504 (emphasis added) (footnote omitted). Justice Stewart's dissenting opinion is no less emphatic, noting that in a "juxtaposition of parties" case the defendant has the right to try legal claims to a jury:

> Thus, if in this case the complaint had asked merely for a judgment declaring that the plaintiff's specified manner of business dealings with distributors and other exhibitors did not render it liable to Beacon under the antitrust laws, this would have been simply a "juxtaposition of parties" case in which Beacon could have demanded a jury trial.

359 U.S. at 515 (Stewart, J., dissenting).[4] It is therefore the blackest of blackletter law that a plaintiff

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[4] In a footnote, Justice Stewart elaborated:

> "Transposition of parties" would perhaps be a more accurate description. *A typical such case is one in which a plaintiff uses the declaratory judgment procedure to seek a determination of nonliability to a legal*

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insurer cannot – by pre-emptively seeking a declaration of non-liability – deprive its insured of the right to try its legal claims based on its policy rights to a jury.[5]

II. There Is No Circuit Conflict Concerning Declaratory-Judgment Actions.

A. The Fifth Circuit decision in *Harrison* presents no conflict.

The Fifth Circuit decision that petitioner and amicus Maritime Law Association cite as being in

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claim asserted by the defendant. The defendant in such a case is, of course, entitled to a jury trial.

Beacon Theatres, 359 U.S. at 515 n.7 (Stewart, J., dissenting) (emphasis added). In modern terms, this is an "inverted lawsuit" in which the true defendant is the declaratory-judgment plaintiff and the true claimant is the defendant.

[5] In *Beacon Theatres*, the Court also considered whether the plaintiff had asserted an equitable claim for injunctive relief that would have priority over the legal anti-trust claims. 359 U.S. at 504-506. The Court ruled that Fox's equity-based claims could not deprive Beacon of its jury-trial right. *Id.* at 508-511. Its holding was "consistent with the plan of the Federal Rules and the Declaratory Judgment Act to effect substantial procedural reform while retaining a distinction between jury and nonjury issues and leaving substantive rights unchanged." *Id.* at 508-509. Furthermore, the Court emphasized the narrowness of a district court's discretion to give equitable non-jury claims priority over legal jury-right claims. "Since the right to jury trial is a constitutional one," the Court noted, "while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Id.* at 510; *see also* Pet. App. 14a (quoting the "wherever possible" admonition).

conflict, *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978), *see* Pet. 9-11, is not a declaratory-judgment action and its facts are not analogous to an "inverted" lawsuit in which an insurer such as petitioner steals a march on its insured, the true claimant, through a preemptive declaratory-judgment action.

In *Harrison*, an injured longshoreman sued a vessel owner which then impleaded the stevedore that employed the plaintiff. In his original complaint and later in the amended complaint against all parties, the plaintiff designated his claims as admiralty and maritime claims under Rule 9(h). *Harrison*, 577 F.2d at 973. The stevedore in turn filed a fourth-party complaint against the shipper (Rohm and Haas) of the product that injured the plaintiff. After a bench trial, the district court granted Harrison judgment against Rohm and Haas, which appealed *inter alia* on the grounds that it had been deprived of a right to a jury trial.

On those facts, the Fifth Circuit "refuse[d] to permit a third-party defendant to emasculate the election given to the plaintiff by Rule 9(h) by exercising the simple expedient of bringing in a fourth-party defendant. *Id.* at 987. The fourth-party complaint was based on the same set of operative facts that gave rise to the first complaint. *Id.* The plaintiff had amended his complaint to state a claim directly against Rohm and Haas pursuant to Rule 9(h). *Id.* And the plaintiff had not alleged diversity as an alternative basis of jurisdiction. *Id.* None of these factors concerns an

insurer's use of declaratory-judgment procedure to deprive the true claimant, the insured, of its jury-trial right. Petitioner therefore has no grounds for asserting that "[a]pplying the Fifth Circuit's rule to this case, petitioner would prevail." Pet. 10-11. *Harrison* bears no resemblance to the present case.

B. The Eighth and Ninth Circuit decisions do not suggest a conflict.

Petitioner is wrong to suggest that *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Oil*, 704 F.2d 1038, 1041-42 (8th Cir. 1983), and *Wilmington Trust v. United States District Court for the District of Hawaii*, 934 F.2d 1026, 1032 (9th Cir. 1991), align with the decision below in this conflict because, like *Harrison*, these decisions do not concern declaratory-judgment procedure. These decisions concern the circuit conflict over counter- and cross-claims that the Fourth Circuit did not decide. *See supra* at 7; Pet. App. 12a-15a. Both decisions nonetheless hold that a plaintiff, by designating its claim under Rule 9(h), cannot deprive a defendant counterclaimant of its constitutional jury-trial right.

The Fourth Circuit considered these decisions when addressing the cases concerning legal counter- and cross-claims. Pet. App. 12a-14a. But it did not base its result on those decisions, relying instead on the controlling *Beacon Theatres* rule that rendered respondent's counterclaim irrelevant. *Id.* 15a-18a.

C. District Court decisions are not persuasive.

Only a few district court decisions have reached a result contrary to the decision below and permitted an insurer to invoke Rule 9(h) in a declaratory-judgment action and thereby trump an insured's right to try its counterclaim to a jury. Pet. 14-15. It would be premature for this Court to address these district court decisions before any court of appeals has reached a result contrary to the decision below and thus created an inter-circuit conflict.

In any event, these district court decisions rely almost exclusively, and superficially, on Rule 9(h), without examining the origins of the Declaratory Judgment Act, the numerous circuit decisions holding that a plaintiff cannot use declaratory-judgment procedure to deprive a defendant of its jury right, and this Court's reasoning in *Beacon Theatres* (in both the majority and dissenting opinions) that a declaratory-judgment action cannot defeat a declaratory-judgment defendant's right to try legal claims to a jury. This Court should give the respective courts of appeals an opportunity to review some of these ill-considered decisions (if the district courts in question even adhere to them). If the courts of appeals do not correct the error, and thus an inter-circuit conflict were to develop, this Court may wish at that time to address the problem that would then exist.

III. The Fourth Circuit's Rule Is Not Inconsistent With This Court's Precedent And The Federal Rules.

A. *Waring* does not preclude the Fourth Circuit's decision.

Petitioner claims that *Waring* precludes the Fourth Circuit's decision (Pet. 15-18), but it fails to address the fact that *Waring* does not concern declaratory-judgment procedure and therefore does not sanction an insurer's use of Rule 9(h) in a declaratory-judgment action to defeat its insured's jury-trial right. Furthermore, petitioner ignores the fact that "[w]hile this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them." *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963) (citing *Waring*) (footnotes omitted).

As petitioner notes, Pet. 16, *Waring* concerns a defendant's assertion that the saving-to-suitors clause carved out of admiralty jurisdiction cases triable at common law. This Court rejected that assertion because the Seventh Amendment does not extend to admiralty claims and the saving-to-suitors clause therefore does not restrict a federal court's admiralty jurisdiction or require jury trials in admiralty cases. *Waring*, 46 U.S. at 460-461. That the Seventh Amendment does not require admiralty claims to be tried to juries is not the issue here. What is at issue, what is dispositive, and what petitioner steadfastly ignores, is the long-settled rule that

plaintiffs cannot use declaratory-judgment actions to trample jury-trial rights. And what the Declaratory Judgment Act, all court-of-appeals decisions applying that Act, and *Beacon Theatres* make plain is that in an "inverted" declaratory-judgment action – in which the defendant is the true claimant – the *defendant's* jury-trial right prevails. *Waring* does not speak to *that* issue, and is therefore irrelevant.

B. The Federal Rules do not preclude the Fourth Circuit's decision.

According to petitioner, Pet. 19, "[t]he Fourth Circuit's opinion allows a defendant in a declaratory judgment action in admiralty to eviscerate a plaintiff's right to a non-jury trial under Rule 9(h) and Rule 38(e) of the Federal Rules of Civil Procedure, contrary to the intent of those rules and historical admiralty practice and procedures." But petitioner cites no evidence suggesting that Rules 9(h) and 38(e) were ever intended to govern declaratory-judgment actions, much less alter the settled rule that a plaintiff cannot use the Declaratory Judgment Act to deprive a defendant of its jury-trial right.

Petitioner also ignores Rule 38(a), providing that the "right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate." That Rule is consistent with the Declaratory Judgment Act and also informs the *Beacon Theatres* principle that a district court in a declaratory-judgment action must exercise

its discretion to preserve jury trial "wherever possible." *Beacon Theatres*, 359 U.S. at 508-510 (citing Rule 38(a)).

Petitioner's assertion, Pet. 21-22, that Rules 9(h) and 38(e) do not "abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072, changes nothing. This Court's rule-making power does not abridge a paramount constitutional right.

C. The Fourth Circuit correctly relied on *Beacon Theatres*.

Petitioner seeks to distinguish *Beacon Theatres* on the grounds that it "involves neither admiralty jurisdiction nor the plaintiff's election under Rule 9(h) to proceed in admiralty without a jury trial." Pet. 22. That assertion is just one more manifestation of petitioner's refusal to address the declaratory-judgment nature of the action.

As the Fourth Circuit succinctly concludes, Pet. App. 18a, *Beacon Theatres* is controlling because it recognizes that if a claimant has a constitutional jury-trial right, it cannot lose that right simply because its adversary initiates a declaratory-judgment action. Under *Beacon Theatres*, a court must determine whether the defendant would have had a jury-trial right if there were *no* declaratory-judgment remedy. And if the defendant would have had a jury-trial right, it cannot lose that right simply because the plaintiff initiated the declaratory-judgment action. That longstanding rule does not lose force

when an insurer such as petitioner initiates a declaratory-judgment action against its insured under the district court's admiralty jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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